June 17, 2002

Office of Counsel

Subject: Hylebos Waterway Natural Resource Damage Settlement Proposal Report

Hylebos NRDA Settlement Proposal Comments
Attn: Ms. Gail Siani
NOAA Damage Assessment and Restoration Center NW
7600 Sand Point Way NE
Seattle, WA 98115-0070

Dear Ms. Siani:

Enclosed are our comments regarding the Hylebos Waterway Natural Resource Damage Settlement Proposal Report.

Sincerely,

Siri C. Nelson
Deputy District Counsel

Enclosure

Cc
Robert Foster

13 June, 2002

Comments on Hylebos Waterway Natural Resource Damage Settlement
Proposal Report

1. Page 9, Paragraph 2, 3rd Sentence. It appears as though the Trustees included damages from over-water structures and log-rafting as damages. However, both of these are legal activities, not hazardous pollutants and therefore, should not count as damages under CERCLA.

2. Page 20, 3rd Full Paragraph, 3rd Sentence. Please provide information concerning the participation of certain PRP's in the damage assessment so that it can be determined if there was any conflict-of-interest.

3. Attachment 2. This attachment includes information not generally accepted by and still being negotiated among parties. For example, the U. S. Navy and U. S. Dept. of Defense are both named as associated parties for the Occidental property. Both parties' involvement in this property has never been substantiated. In addition, the U. S. Navy and the U. S. Dept of Defense are named as associated parties for several other properties for which their involvement has not been demonstrated. Therefore, this attachment should be removed from this document.

4. Appendix D, Page 2, 3rd Paragraph, 2nd Sentence. It appears as if this entire NRDA Settlement Proposal is premature if as stated here that "More rigorous scientific scrutiny will likely result in injury threshold values different than those reported here". These injury threshold values are the basis from which the damages are calculated.

5. Appendix D, Page 4, Table 1. Please clarify where the 1994 bivalve AET came from since the USACE Dredged Material Management Office and Washington Department of Ecology have no record of this AET. It is probably the 1998 bivalve data which has not been extensively reviewed and is of questionable quality. This is important because many of the extremely low injury threshold numbers were set using these bivalve AET values. See comments on Tables 2 and 3 below.

6. Appendix D, Pages 7 and 9-13, Tables 2-7. The concentrations at which the lowest service loss value is set, the injury threshold value, are too low and overestimate damages. They are much lower than the majority of the Sediment Quality Standards and 1998 Dredged Material Management Program Chemical Guidelines (DMMP). This is significant since the SQS and DMMP values are promulgated regulatory numbers below which cleanup would not be required. The majority of these low threshold values are based on the questionable 1998(?)

bivalve AET. Footnotes to Tables 2-7 state that "The bivalve bioassay AET is not used if values are present for the more-accepted Oyster bioassay". This statement seems to imply that the trustees are aware that the bivalve AET is of questionable value.

The PAH injury threshold number of 1000 ppb appears to be derived from the NOAA white paper titled "An Analysis in Support of Sediment Quality Thresholds for Polycyclic Aromatic Hydrocarbons (PAHs) to Protect Estuarine Fish". This paper is based on studies conducted by NOAA and was never sent out for a broad-based scientific and regulatory review for comment and revision. The PAH value of 1000 ppb is below SQS and DMMP values as well as below the background concentration for PAH's in most industrialized harbors. This injury threshold number being this low is a major problem since almost half of the damages assessed are based on PAH concentrations. Damages of this magnitude should be based on numbers with a greater scientific basis. In addition, Tracy Collier of NMFS stated at the 2001 Sediment Management Annual Review Meeting that "these papers (white papers) did not recommend sediment cleanup levels, although they could be used to determine "not likely to adversely effect levels. The papers did not represent the final answer, but represented their current assessment. Further research would improve the strength of the recommendations. In addition the papers were not policy guidelines from NMFS, but should be regarded as a scientific paper to support policy decisions and development." From statements made in the NRDA Settlement Proposal, it is clear that the trustees are not completely sure of the scientific validity of the threshold injury values (See Comment 4 above).

7. Addendum to Appendix D, Page 6, 1st Paragraph, 3rd Sentence. As stated in this sentence NOAA's data have been corrected for surrogate recoveries. This is not a standard practice in chemistry. In fact, two of EPA's standard methods, CLP and SW-846, commonly used for Superfund projects, do not allow this type of correction. Furthermore, the only time that corrections such as this may be acceptable is when using stable isotope dilution techniques.

8. Addendum to Appendix D, Page 6, 2nd Paragraph. The application of an adjustment factor to the HCC data as described in this addendum is not a standard practice. The HCC data were validated, widely reviewed, and accepted by EPA as reported by the laboratory. The use of correction factors as large as 300% to data that have been validated and accepted is indefensible.

9. It appears that data have been so extensively manipulated for use in this extremely complex scheme that there is a high probability for distortion and error.